UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE STATEMENT OF COUNSEL (DKT. NO. 2412)**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants"), offer the following reply in support of their Motion in Limine to Exclude Statement of Counsel (Dkt. No. 2412, incorporating in part Dkt. No. 2393).

First, Defendants' joint reply to Plaintiffs' response on this issue (Dkt. No. 2565) adequately addresses the points made in paragraph 4 of Plaintiffs' response (Dkt. No. 2485 at 2-3), and Cargill joins in that reply rather than repeating it here.

As to paragraphs 5 and 6 of Plaintiffs' response, Plaintiffs baldly assert that Mr. Ryan was acting as the Cargill Defendants' attorney in his opening statement at the preliminary injunction hearing, and that his statements can therefore be used as admissions against the Cargill Defendants. The only support Plaintiffs offer for this conclusion is the fact that Mr. Ryan referred to the Defendants collectively as "the defendants" several times during his opening statement. Based on this fact alone, Plaintiffs assert that "Mr. Ryan was acting as the Cargill Defendants' attorney, or, at the very least, their 'agent.'" (Dkt. No. 2485 at 3.) Plaintiffs cite no precedent or other legal authority for drawing such a substantial and conclusive inference from such casual and innocuous statements. The two authorities Plaintiffs cite for their position, U.S. Energy Corp. v. Nukem, Inc., 400 F.3d 822, 833 n.4 (10th Cir. 2005) and Federal Rule of

Evidence 801(d)(2), deal exclusively with the admissibility of a statement by an admitted agent or attorney; they do not in any way suggest any legal basis for inferring an attorney-client relationship on as thin a reed as Plaintiffs urge here. Notably, Plaintiffs' response does not dispute (1) that the Cargill Defendants have never retained Mr. Ryan as their attorney, or (2) that neither the Cargill Defendants nor Mr. Ryan himself ever represented to the Court or to Plaintiffs that Mr. Ryan represented the Cargill Defendants. Mr. Ryan simply did not represent the Cargill Defendants at the PI hearing.[1]

Plaintiffs' response tries to attach some significance to the fact that the Cargill Defendants' attorneys of record did not object to Tyson attorney Mr. Ryan's statement concerning overapplication when he made it. (Dkt. No. 2485 at 3.) But the Cargill Defendants' attorneys also did not object to Attorney General Edmondson's opening statement (despite their disagreement with much of what Mr. Edmondson said), yet Plaintiffs do not suggest that Mr. Edmondson was speaking on behalf of the Cargill Defendants. Inferring an attorney-client relationship from an attorney's courtesy in not interrupting another attorney's opening statement reaches much too far. The Cargill Defendants submit that an attorney's courtesy in declining to interrupt another party's attorney's opening statement cannot establish an attorney-client relationship between the first party and the attorney.

Plaintiffs are also mistaken in asserting that "Defendants themselves have largely defended this case as an industry" and that Mr. Ryan's opening is "one such example." (Dkt.

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[1] Plaintiffs' offhand attempt to use the term "agent" as an alternative to "attorney" does nothing to assist their argument. Inasmuch as the Cargill Defendants are both corporations, only their attorneys can speak for them in court. See Local Rule 17.1 ("Parties who are not natural persons may not appear pro se."). Thus, because Mr. Ryan was not the Cargill Defendants' attorney, he could not have spoken for them in court in any other capacity.

No. 2485 at 3.) On the contrary, the Court need only look at the **very next passage** of Mr. Ryan's opening after his "over-application" statement to find a clear statement of the distinctions among the Defendants and the consequent burden on the Plaintiffs:

> Your Honor, these are the defendants, there's 13 of them. They're in seven, if you will, if you disregard affiliated companies, there's seven companies. ***The plaintiffs want to treat us as if we were one homogenous group.*** And if they can show that the defendants, plural, apply bacteria somehow to the waterways and that makes all the defendants liable. ***These defendants are competitors of one another, Your Honor. Some are small family-owned companies, some are not, but we're not a homogeneous one entity*** that you can just simply say well, if we can prove that they did something, then we're going to get this injunction. That's simply not the law, Your Honor.

Feb. 19, 2008 Tr. at 46:19-47:5 (emphasis added). In particular, the Cargill Defendants have repeatedly insisted that Plaintiffs have pled and need to prove individual claims against individual Defendants. (E.g., Cargill Defs.' Mot Compel 30(b)(6) Deponents: Dkt. No. 1270 at 8-9; Cargill Defs.' Mot. Compel Discovery: Dkt. No. 1941 at 24-25.)

Moreover, the consequences of the rule that Plaintiffs propose would have major implications under the rules governing attorneys' professional conduct. If Mr. Ryan had indeed been the Cargill Defendants' attorney (however briefly), then he would have owed the Cargill Defendants professional duties of loyalty, disclosure, and obedience. See Okla. R. Prof. Cond. 1.2, 1.3, 1.4. Obviously, the imposition on a Tyson attorney of such duties to the Cargill Defendants under the circumstances here would be absurd. Such a result is, however, the necessary implication of Plaintiffs' argument.

Finally, Plaintiffs' proposed rule would make a shambles of any attempt to have a coherent and comprehensible presentation of facts and argument at trial. Under Plaintiffs' rule, any Defendant that wished to insure that no other Defendant's attorney was mistakenly interpreted as speaking on its behalf would have no choice but to make a record every time the possibility of such a misunderstanding arose. As a result, every Defendant's attorney would

need to stand up and object—or at least make a record of non-joinder—whenever a codefendant's attorney made a comment, asked a question, or offered an objection with which the first attorney's client may not agree. Such a procedure would be unworkable and is entirely unnecessary. Each Defendant has attorneys of record and, absent formal joinder or some agreement by the parties and the Court, those attorneys are the ones who speak for that Defendant.

CONCLUSION

Plaintiffs' assertion that the Cargill Defendants and Mr. Ryan had an attorney-client relationship without the consent or even the knowledge of either lacks any basis either in law or in the facts here. Thus, even assuming that the statement of Tyson's attorney were admissible against some party on some ground, any such statement cannot be attributed to the Cargill Defendants and is inadmissible as to them. The Court should grant the Cargill Defendants' motion.

Dated: September 4, 2009.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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